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WEE LIAN CONSTRUCTION SDN BHD

v.

INGERSOLL-JATI MALAYSIA SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
[CIVIL APPEAL NO: P-02-1112-2004]

C

5 MARCH 2010

CONTRACT: *Contract for sale of goods - Sale of goods by description - Whether goods correspond with description - Whether buyer had opportunity to inspect goods - Contracts Act 1950, ss. 15, 41, 42, 55*

D

The plaintiff and the defendant entered into an agreement for the sale and purchase of a used machine, an Ingersoll-Rand CM 351 Crawler Drill c/w VL140 Drifter Serial No. V93415 at a purchase price of RM130,000. The agreement was subject to the terms and conditions contained in the purchase order signed and accepted by the plaintiff with the following clause, "We have read and agreed to the Sales Conditions stated overleaf". The machine was used by the plaintiff for a period of 22 months and there was no written complaint issued by the plaintiff to the defendant within the agreed six-month warranty period. The defendant had, after the expiry of the warranty period continued to provide goods and after-sales service and repair on the machine as and when requested by the plaintiff that had amounted to a sum of RM31,338.41 ('the outstanding sum'). The plaintiff failed to pay the outstanding sum despite repeated demands. It was the plaintiff's case that the machine was fitted with a VL120 drifter instead of a VL140 drifter and therefore did not correspond with the description that was agreed upon. The plaintiff then commenced an action against the defendant for damages. The defendant counterclaimed for the outstanding sum. The trial judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. The plaintiff now appealed.

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Held (dismissing plaintiff's appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

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(1) There was credible evidence to support the trial judge's finding of facts. The trial judge had meticulously embarked upon a careful appreciation of the evidence adduced at the trial, and

assessed, weighed and, for good reasons, accepted the evidence adduced for the defendant as credible. An appellate court will not, generally, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion. The instant appeal revolved around the finding of primary facts which were unassailable and so should neither be overruled nor supplemented by an appellate court. That ground was sufficient to dispose of the plaintiff's appeal. (paras 22 & 23)

(2) The defendant's counterclaim was a straightforward demand to recover the price of goods and services rendered as stated in the defendant's invoices delivered to the plaintiff. (para 26)

Per Abdul Malik Ishak JCA delivering separate concurring judgment:

(1) Section 41(1) of the Sale of Goods Act 1957 allows the purchaser the right to examine the goods delivered to him. Therefore, if a purchaser has examined the goods and accepted them, he cannot reject them after a reasonable time. That brings into play s. 42 of the said Act. (paras 50 & 51)

(2) The plaintiff did not reject the machine despite being given ample time and opportunity. The plaintiff failed to take advantage of the six months' warranty period. The plaintiff only raised the notice of alleged non-compliance of description and rejection of the machine after an inordinate delay of almost two years from the delivery date. The plaintiff had also used the machine side by side with a brand new machine without raising any complaint to the defendant. The genuineness of the plaintiff's claim was questionable. That apart, there was ample evidence to suggest that third parties would have had access to the machine. (paras 60, 61, 62 & 63)

(3) Although the plaintiff saw it fit not to make any payment in regard to the defendant's invoices, the invoices pertained to the price of the goods and for the services rendered. The defendant was entitled to get judgment for the counterclaim. (para 70)

(4) As the trial judge peppered his written judgment with findings of facts, it was a judgment that did not require appellate intervention. An appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its decision. (para 71)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif dan defendan telah memeterai satu perjanjian jual beli mesin terpakai yang dipanggil 'Ingersoll-Rand CM 351 Crawler Drill c/w VL140 Drifter Serial No. V93415' pada harga belian RM130,000. Perjanjian tertakluk kepada terma dan syarat seperti yang terkandung di dalam pesanan pembelian, yang ditandatangani dan diterima oleh plaintif beserta dengan ungkapan berikut, iaitu "Kami telah membaca dan bersetuju dengan Syarat-Syarat Jualan seperti yang termaktub di belakang". Mesin telah digunapakai oleh plaintif selama 22 bulan dan tiada apa-apa rungutan bertulis dibuat oleh plaintif kepada defendan dalam tempoh waranti enam bulan yang dipersetujui. Selepas tempoh waranti berakhir, defendan terus membekalkan barangan dan khidmat-selepas-jualan kepada plaintif berkaitan dengan mesin mengikut keperluan plaintif, yang kesemuanya bernilai RM31,338.41 ('jumlah tertunggak'). Plaintif gagal membayar jumlah tertunggak walaupun telah beberapa kali ditagih oleh defendan. Menjadi kes plaintif bahawa mesin telah dipasang dengan drifter VL120 dan bukannya drifter VL140 dan dengan itu tidak menepati apa yang dipersetujui oleh pihak-pihak. Berikutnya plaintif memulakan tindakan gantirugi terhadap defendan, sementara defendan pula menuntut balas untuk mendapatkan jumlah tertunggak. Yang arif hakim telah menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Maka plaintif merayu.

Diputuskan (menolak rayuan dengan kos)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Terdapat keterangan yang boleh dipercayai bagi menyokong dapatan-dapatan fakta hakim bicara. Hakim bicara telah menilai keterangan-keterangan yang dikemukakan di perbicaraan secara berhati-hati, dan telah menilai, menimbang, dan atas sebab-sebab yang kukuh menerima keterangan yang dikemukakan oleh defendan sebagai boleh dipercayai. Sebuah mahkamah rayuan umumnya tidak akan campurtangan atau mengganggui keputusan mahkamah bicara kecuali jika mahkamah tersebut jelas khilaf dalam mencapai keputusannya. Rayuan semasa berkisar di sekitar dapatan-dapatan fakta utama yang tidak dapat dipersalahkan, dan oleh itu, dapatan-dapatan tersebut tidak boleh diakas atau dipinda. Alasan ini sahaja adalah memadai untuk melupuskan rayuan plaintif.

(2) Tuntutan balas responden adalah satu tuntutan yang betul benar untuk mendapat kembali harga barang-barang dan perkhidmatan yang diberikan selaras dengan apa yang tercatat pada invois-invois defendan yang diserahkan kepada plaintif.

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman bersetuju yang berasingan:

(1) Seksyen 41(1) Akta Jualan Barangan 1957 memberi hak kepada pembeli untuk memeriksa barangan yang diserahkan kepadanya. Oleh itu, jika seorang pembeli telah memeriksa barangan dan telah menerimanya, maka beliau tidak lagi boleh menolaknya selepas berlalunya satu tempoh yang munasabah. Itu membangkitkan peranan s. 42 Akta.

(2) Plaintif tidak menolak barangan walaupun mempunyai masa dan peluang yang panjang untuk berbuat demikian. Plaintif gagal mengambil manfaat dari tempoh waranti enam bulan yang diberikan. Plaintif hanya memberi notis ketakpatuhan terhadap perihal barangan yang didakwa dan penolakan mesin selepas berlengah selama hampir dua tahun selepas tarikh penyerahan. Plaintif juga telah menggunakan mesin sebelah menyebelah dengan mesin baru tanpa membangkitkan apa-apa rungutan kepada defendan. Oleh hal yang demikian, keikhlasan tuntutan plaintif adalah boleh dipersoalkan. Selain itu, terdapat banyak keterangan yang menunjukkan bahawa mesin juga terdedah kepada penggunaan pihak ketiga.

(3) Walaupun plaintif merasa wajar untuk tidak membuat bayaran atas invois-invois defendan, invois-invois tersebut jelas berhubung dengan harga barang-barang dan perkhidmatan yang diberikan. Maka defendan berhak untuk mendapat penghakiman atas tuntutan balasnya.

(4) Oleh kerana hakim bicara menyilangi penghakimannya dengan dapatan-dapatan fakta, maka penghakimannya tidak mewajarkan campurtangan peringkat rayuan. Sebuah mahkamah rayuan tidak akan campurtangan kecuali mahkamah bicara telah melakukan kesilapan jelas dalam mencapai keputusannya.

Case(s) referred to:

Arcos, Limited v. EA Ronaasen And Son [1933] AC 470
Armagas Ltd v. Mundogas SA [1985] 3 WLR 640
Ashington Piggeries Ltd and Another v. Christopher Hill Ltd, Christopher Hill Ltd v. Norsildmel [1972] AC 441
Barker, JR, & Co, Ltd v. Edward T Agius Ltd [1927] 28 Lloyd's Law Report 282
Beale v. Taylor [1967] 3 All ER 253
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40
Couchman v. Hill [1947] 1 KB 554
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC
Eastern Supply Co v. Kerr [1974] 1 MLJ 10
Edmund Bowes, JB Martin, and WL Kent v. Charles Shand, Alexander Shand, And RA Robinson [1876-7] 2 App Cas 455
Eu Boon Yeap & Ors v. Ewe Kean Hoe [2007] 6 CLJ 791 CA
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC
Hardy And Company v. Hillerns And Fowler [1923] 2 KB 490
L'Estrange v. F Graucob, Limited [1934] 2 KB 394
Leaf v. International Galleries [1950] 1 All ER 693
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA
Muniandy & Ors v. PP [1966] 1 MLJ 257
Nicholson and Venn v. Smith Marriott and Another [1947] 177 LT 189
Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack, Owners of Steamship Hontestroom v. Owners of Steamship Durham [1927] AC 37
Perkins v. Bell [1893] 1 QB 193
Powell And Wife v. Streatham Manor Nursing Home [1935] AC 243
Reardon Smith Line Ltd v. Hansen-Tangen, Hansen-Tangen v. Sanko Steamship Co [1976] 3 All ER 570
Rex v. Low Toh Cheng [1941] 10 MLJ (SSR) 1
Sorabji Hormusha Joshi and Co v. VM Ismail and another, AIR [1960] Madras 520
State of Rajasthan v. Hanuman AIR [2001] SC 282
Tengku Mahmood v. PP [1974] 1 LNS 176 HC
Tek Chand v. Dile Ram AIR [2001] SC 905
The Sanko Steamship Co Ltd v. Kano Trading Ltd [1978] 1 Lloyd's Law Reports 156
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119
Varley v. Whipp [1900] 1 QB 513
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Sale of Goods Act 1957, ss. 15, 41(1), 42, 55(1)

Other source(s) referred to:

Andrew Phang Boon Leong, *Law of Contract*, 1998 edn, pp 42, 325

For the plaintiff/appellant - Dato' Mahinder Singh Dulku (Lim Chong Fong & Chu Ai Li with him); M/s Azman Davidson & Co
For the defendant/respondent - Goh Siu Lin; M/s Shook Lin & Bok

[Appeal from High Court, Penang; Suit No: MT4-22-262-2000]

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] Parties are referred to in their capacities in the High Court.

[2] The plaintiff's appeal is against:

(1) the dismissal of its claim for damages; and

(2) the granting of the defendant's counterclaim for RM31,338.41 as at 29 February 2000.

The Facts

[3] The trial has led to the following finding of facts by the learned judge.

[4] On 28 May 1996, the plaintiff and the defendant entered into an agreement for the sale and purchase of a used machine, an "Ingersoll-Rand CM351 Crawler Drill c/w VL140 Drifter Serial No. V93415" ("the machine") at RM130,000, subject to the terms and conditions contained in the purchase order No. BW 3755 signed and accepted by the plaintiff which, at the bottom left thereof, states "we have read and agreed to the Sales Conditions stated overleaf".

[5] In line with the defendant's industry practice, the defendant had through its employees conducted checks on all machines (new or used) including the machine so as to ensure that they corresponded with the description that was contracted for. Sam Siew Kooi, defendant's service manager (DW1) had personally inspected the machine and verified, by using the visual/finger test, that the drifter was a VL140 Drifter bearing serial number V93415 before it was delivered to the plaintiff. Yong Kin Hooi, defendant's inventory

A supervisor (DW4) had supervised the loading of the machine onto the lorry and confirmed that the serial number was V93415, as found on a plate and stamped/engraved on the body of the main frame.

B **[6]** The machine was confirmed to be fitted with a VL140 drifter prior to delivery to the plaintiff. According to contemporaneous documents contained in the pre-delivery inspection Check List (Crawler Drill), the machine was the only second-hand machine for sale by the defendant.

C **[7]** In 1996, the machine, which was manufactured in 1989, was approximately seven years old. It has a useful service life of 10-12 years, if well maintained.

[8] The machine was delivered to the plaintiff's representative,
D one Heng Wee Piao, at the plaintiff's Jambul Indah site (also known as the "IJM site") on 15 July 1996 when it was tested and started-up. Plaintiff's director Heng Wooi Hin (PW1), who holds a B.Sc Degree in Engineering, was also present at the time of delivery. He knew which part of the machine was called the drifter.
E He was aware that the defendant sold drifters of various sizes and had been given a photocopied manual for reference purposes. PW1 admitted that the plaintiff had used crawler drills before, as the plaintiff has been in the rock-blasting business for the past 26 years.

F **[9]** The machine was used by the plaintiff for a period of 22 months from 15 July 1996 to May 1998, at the IJM site and then at another place known as the PPH site. No written complaint was ever issued by the plaintiff to the defendant within the agreed six-month warranty period.

G **[10]** The email dated 24 April 1998 and the letter dated 7 May 1998 relied upon by the plaintiff were not sent to the defendant, but to another legal entity in USA, which responded as follows:

> … I am certain there has been no intention to misrepresent the
H machine as some other model. The Ingersoll-Rand Rock Drill Division in Roanoke, Virginia is not involved in the sale of reconditioned units.

[11] PW1 was fully aware that he was purchasing a second-hand machine, and the drifter was the "workhorse" of the machine.
I

[12] On 14 July 1997, the plaintiff bought a new machine Ingersoll-Rand Crawlair Drill with a VL 140 drifter from the defendant for RM215,000. This new machine was shipped to the PPH site in August 1997.

[13] In 1996, the cost of a new machine fitted with a VL140 drifter was RM218,000. A new VL140 drifter by itself would cost RM68,000 only.

[14] On 8 April 1998, the machine was repaired due to drifter piston failure which could have resulted from various factors eg. lack of lubrication, side-rods not tightened or aligned properly, or someone unscrewing/tampering with bolts/nuts of the side-rods of the drifter. It was during this time that the plaintiff was informed by one Yeap Set Teg (an employee of the defendant) that the machine was not equipped with a VL140 drifter.

[15] The defendant had, after the expiry of the six-month warranty period, continued to provide goods and after-sales service and repair works on the used machine, as and when requested by the plaintiff amounting to RM31,338.41 as at 29 February 2000, inclusive of the accrued contractual interest thereon at 1.5% per month, which rate was reflected at the bottom right hand corner of the defendant's respective invoices.

[16] The plaintiff had defaulted in the payment of the defendant's invoices and had failed, refused and/or neglected to pay the outstanding sum or any part thereof despite repeated demands.

[17] By a letter dated 17 March 2000, the defendant through its solicitors, Messrs Shook Lin & Bok, demanded payment of the outstanding sum.

[18] On 22 September 2004, the learned trial judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. Pursuant to the counterclaim, the plaintiff had paid the judgment sum on or about 14 December 2004.

VL140 or VL120 Drifter?

[19] Learned counsel Dato' Mahinder Singh Dulku (assisted by Mr Lim Chong Fong and Ms Chu Ai Li) argued for the plaintiff that the machine delivered by the defendant to the plaintiff did not have a VL140 Drifter attached to it; instead a VL120 Drifter was fitted.

[20] Defendant's learned counsel Ms Goh Sui Lin submitted for the defendant that the VL140 Drifter was attached to the machine at the time of delivery to the plaintiff.

[21] The defendant's submission was sustained by the learned trial judge who found as a fact that the VL140 Drifter was attached to the machine.

[22] In our view, there is credible evidence to support the learned trial judge's finding of facts. The learned trial judge had meticulously embarked upon a careful appreciation of the evidence adduced at the trial, and assessed, weighed and, for good reasons, accepted the evidence adduced for the defendant as credible. An appellate court will not, generally speaking, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion: See *Eu Boon Yeap & Ors v. Ewe Kean Hoe* [2007] 6 CLJ 791 CA; *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC. The instant appeal revolves around the finding of primary facts which are unassailable and so should neither be overruled nor supplemented by an appellate court.

[23] As this ground is sufficient to dispose of the plaintiff's appeal against the dismissal of its claim against the defendant, we do not find it necessary to consider other issues explored by the respective learned counsel. However, we record our appreciation to them for their enormous efforts.

Defendant's Counterclaim

[24] The learned trial judge found that the plaintiff had failed to make payment on the defendant's invoices. Payment terms were within 30 days of the date of the invoices as reflected on the face of each invoice.

[25] Plaintiff's delay in payment entitles the defendant to charge interest at 1.5% per month for all late payments.

[26] We are of the view that the defendant's counterclaim is a simple and straightforward demand to recover the price of goods and services rendered as stated in the defendant's invoices delivered to the plaintiff.

Conclusion

[27] By reason of the foregoing grounds, we hold that the plaintiff's appeals are without merits and are dismissed with costs of RM5,000. The decision of the High Court, in dismissing the plaintiff's claim and allowing the defendant's counterclaim, are both affirmed. Deposit to the defendant on account of the costs.

[28] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[29] This is my supporting judgment to that of my learned brother Low Hop Bing, JCA.

[30] After a full trial, the learned judge of the High Court dismissed the plaintiff's claim (Wee Lian Construction Sdn Bhd's claim) with costs. The learned judge of the High Court allowed the defendant's counterclaim (Ingersoll-Jati Malaysia Sdn Bhd's counterclaim) for the sum of RM31,338.41 as at 29 February 2000 together with interest of RM23,022.88 at the rate of 18% per annum with monthly rests from 1 March 2000 to the date of full payment together with costs.

[31] Aggrieved by that decision, the plaintiff files an appeal to this court.

[32] The facts have been lucidly set out by my learned brother Low Hop Bing, JCA and I will not repeat them save when it is necessary to do so.

[33] The machine bearing serial number V93415 was confirmed to be fitted with a VL140 drifter prior to delivery to the plaintiff. The machine too was the only second hand machine for sale by the defendant. Contemporaneous documents confirmed that the machine was indeed fitted with a VL140 drifter. At p. 537 of the appeal record at vol. 3, the pre-delivery inspection (PDI) check-list (crawler drill) showed the drifter to be VL140. Again, at p. 538 of the appeal record at vol. 3 under column "Description of Material or Service required", it showed the drifter to be VL140. And at p. 539 of the appeal record at vol. 3, the machine that was supplied to the plaintiff was described as:

> Ingersoll-Rand CM351 Crawler Drill c/w VL140 Drifter (Used Equipment).

[34] The purchase order number BW3755 as seen at p. 541 of the appeal record at vol. 3 showed the drifter to be VL140. The delivery note as seen at p. 543 of the appeal record at vol. 3 also showed the drifter to be VL140.

[35] The purchase order was signed and accepted by the plaintiff and at the bottom left side of the said purchase order the following caption appeared:

> We have read and agreed to the sales conditions stated overleaf.

[36] That would seal the fate of the plaintiff. In *L'Estrange v. F. Graucob, Limited* [1934] 2 KB 394, at p. 403, Scrutton LJ aptly said and which would surely apply to the plaintiff:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[37] Thus, a person who signs a contractual document is bound by its terms even though he has not read it. In *L'Estrange v. F. Graucob, Limited (supra)*, the proprietress of a cafe bought an automatic cigarette vending machine. She signed, but did not read, a sales agreement which contained an exemption clause "in regrettably small print." It was held that she was bound by the clause, so that she could not rely on defects in the machine, either as a defence to a claim for part of the price, or as entitling her to damages.

[38] It is germane, at this juncture, to refer to s. 15 of the Sale of Goods Act 1957 (Revised 1989). That section enacts as follows:

> Sale by description.
>
> 15. Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

[39] This section covers two types of cases, namely, failure to secure exact conformity with the full contractual description of goods and, consequently, a total failure to perform the contract. In the first type, although the goods are substantially what the buyer wants yet the discrepancy is in relation to some contract particulars.

In *Edmund Bowes, J.B. Martin, and W. L. Kent v. Charles Shand, Alexander Shand, And R.A. Robinson* [1876-7] 2 App. Cas. 455, HL, for instance, where the goods were rejected because they were not shipped within the specified period. In the second type, the goods supplied are to be regarded as not being the goods ordered and thus the contract is said not to be performed. A classic example would be where a vehicle consisting of parts of two cars, one part earlier than 1961 and welded together is delivered when the contract was for a "Herald, convertible, white, 1961, twin carbs" (*Beale v. Taylor* [1967] 3 All ER 253, CA).

[40] In regard to the expression "goods shall correspond with the description" employed in s. 15 of the Sale of Goods Act 1957 (Revised 1989), it is a correct statement of the law to say that every item in a description which constitutes a substantial ingredient in the identity of the thing sold would be a condition (*Couchman v. Hill* [1947] 1 KB 554, 559; and *Reardon Smith Line Ltd v. Hansen-Tangen, Hansen-Tangen v. Sanko Steamship Co* [1976] 3 All ER 570, HL). It must be emphasised that the "description" by which the goods are sold is confined to those words found in the contract which are intended by the parties to identify the kind of goods which were to be supplied. The correct test to apply would be whether the buyer could fairly and reasonably refuse to accept the goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy (*Ashington Piggeries Ltd. and Another v. Christopher Hill Ltd., Christopher Hill Ltd v. Norsildmel* [1972] A.C. 441, HL; and *The Sanko Steamship Co. Ltd. v. Kano Trading Ltd.* [1978] 1 Lloyd's Law Reports 156, CA).

[41] I say that the failure of the seller to supply goods answering the description in the contract is a total failure to perform it and not merely a breach of a single term in the contract (*Sorabji Hormusha Joshi and Co. v. V.M. Ismail and Another,* AIR [1960] Madras 520).

[42] Section 15 of the Sale of Goods Act 1957 (Revised 1989) envisages the situation where the buyer purchases the goods on the basis of description. A classic scenario would be where the buyer has never seen the goods and buys them on the basis of the description given by the seller. *Varley v. Whipp* [1900] 1 QB 513; 69 LJ QB 333; 48 WR 363; 44 SJ 263, for instance, was a case of a sale of a

reaping machine which the buyer had never seen and which the seller stated "to have been new the previous year and used to cut only 50 or 60 acres". On delivery the buyer found the machine to be extremely old and, therefore returned it. The seller's action against the buyer for the price failed. It was, pure and simple, a sale by description and the machine did not correspond with the description.

[43] Again, in a situation where a heifer was sold as unserved, but in fact, it was served and died because it carried the calf at too young an age, it was held that "every item in a description which constitutes a substantial ingredient in the 'identity' of the thing sold is a condition" (*Couchman v. Hill (supra)*, p. 559).

[44] *Nicholson and Venn v. Smith Marriott and Another* [1947] 177 LT 189 was a case of an auction sale of a set of linen napkins and table cloths, described as "dating from the seventeenth century". The plaintiffs, who were dealers in antiquities, saw the set and bought it. They subsequently found it to be an eighteenth century set and sought to reject it. It was held that the plaintiffs could do so. They had relied on the description and the discrepancy between the description and the quality could not have been discovered by casual examination.

[45] In the context of the present appeal, the defendant conducted checks on all the machines be it new or used including the machine in question so as to ensure that it corresponded with the description that was contracted for. DWI (Sam Siew Kooi) had personally inspected the machine and verified it by using the visual/finger test and found that the drifter was VL140 bearing serial number V93415 before it was delivered to the plaintiff.

[46] DW4 (Yong Kin Hooi) had supervised the loading of the machine onto the lorry and confirmed that the serial number was V93415. That serial number was located on a plate and it was also stamped or engraved on the body of the main frame.

[47] There was evidence to show that the defendant conducted a pre-delivery inspection (PDI) by using the visual test in confirming that the drifter was VL140. The visual test used since 1975 was said to be a reliable test. And if the measurement test was used the whole machine would have to be dismantled. The re-examination of DW3 (Chong Yun Koi) at p. 208 of the appeal record at vol. 2 merits reproduction:

Q: Mr. Chong, is the visual test as reliable as the measurement test? A

A: Yes, it is very reliable.

Q: For new machine what test is used to determine if the drifter is a VL120 or VL140? B

A: New machine we will do a physical check ie, a visual test. In all new machines we do a visual test. If we do a measurement test we have to open up the whole machine.

[48] In his examination-in-chief, DW1(Sam Siew Kooi) at p. 240 C of the appeal record at vol. 2 was asked about the finger test and this was what he said:

10. Q: From your experience is this finger test a reliable test to ascertain the difference between a VL140 and VL120 drifter? D

A: Yes, this is the most conclusive and reliable test used since about 1975.

[49] It is my judgment that the application of the "finger test" or E "visual test" would have easily revealed whether the machine was a VL140 or a VL120 drifter. Moreover, the difference between both types of drifters could have been easily verifiable upon examination through the "finger test" or upon the plaintiff obtaining a second opinion. And it could also be easily proved that the machine bore F serial number V954115 if the main frame was inspected. Sad to say, the plaintiff did none of these.

[50] I now make reference to s. 41(1) of the Sale of Goods Act 1957 (Revised 1989). That section enacts as follows: G

41. Buyer's right of examining the goods

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity H with the contract.

[51] Essentially the section allows the purchaser the right to examine the goods delivered to him. Thus, if a purchaser has examined the goods and has accepted them, he cannot reject them I after a reasonable time. This brings into sharp focus s. 42 of the Sale of Goods Act 1957 (Revised 1989) which enacts as follows:

A **42. Acceptance**

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when,
B after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[52] Three authorities may be cited in an appraisal of s. 42 of the Sale of Goods Act 1957 (Revised 1989). The first would be the case
C of *Eastern Supply Co. v. Kerr* [1974] 1 MLJ 10, CA. There at p. 13, Wee Chong Jin CJ (Singapore) aptly said:

It was open to the respondent to have the car examined by an expert before having it driven away. He chose not to do so. Instead he used the car by the use made of it by his wife for about
D two weeks. When during the course of the first few days the various minor defects which we have earlier referred to became apparent to his wife, he again had the opportunity of having the car examined by an expert but chose not to do so. Had he done so and an expert had found the front offside wheel leaning inwards at the
E top by about 10° from the vertical, a 3" play on the wheel and a bright mark on the shock absorber and the expert could say that those defects were serious defects which in the expert's opinion made the car unroadworthy and he had then rejected the car, the defence of a breach of the implied conditions under section 14 of the Sale of Goods Act in answer to the present claim by the
F appellants might well have found favour with the trial judge.

[53] The second would be the case of *Leaf v. International Galleries* [1950] 1 All ER 693, CA. There Denning LJ at p. 695 had this to say:

G In this case the buyer must clearly be deemed to have accepted the picture. He had ample opportunity to examine it in the first few days after he bought it. Then was the time to see if the condition or representation was fulfilled, yet he has kept it all this time and five years have elapsed without any notice of rejection. In my
H judgment, he cannot now claim to rescind, and the appeal shoud be dismissed.

[54] The third and the final case would be *Perkins v. Bell* [1893] 1 QB 193, CA. There AL Smith LJ had this to say at p. 198:

I

> .... under the contract the place of delivery named was the place where the inspection was to be had, and consequently Theddingworth Station was the place where rejection should have taken place and not the premises of the maltsters at Sileby. When the defendant took possession of the barley at the station and ordered it to his sub-vendees, the property in the barley passed to him, and his right of rejection was then gone.

[55] On appraisal of the facts, it would be apparent that the plaintiff had been given the opportunity to inspect the machine prior to delivery. Even after the delivery of the machine to the IJM site, the plaintiff had ample time to examine it during the first few days to see whether the machine was fitted with a VL140 drifter and, at the same time, to seek an expert's opinion. Instead of adopting all these measures, the plaintiff accepted the machine and used it for 22 months. The plaintiff even went to the extent of purchasing a new drifter which had been modified to suit the machine and then sought to claim damages for non-conformity with description and alleged under-production loss long after the expiry of the six months' warranty period.

[56] We are dealing with a sale by description and so the law implies the condition that the goods must correspond with the description. And if the goods do not correspond with the description then the buyer may reject them and it will be no defence to say that they will serve the buyer's purpose. A classic example would be the case of *Arcos, Limited v. E.A. Ronaasen And Son* [1933] AC 470, HL, where the contract was for the sale of staves (timber) to be 1/2 inch thick. The timber supplied varied in thickness from 1/2 inch to 2/3 inch. The buyer's purpose in buying was to make cement barrels and the staves as supplied were fit and merchantable, according to the umpire, for that purpose. The House of Lords held that the buyers could reject the goods as they did not correspond with the description in the contract. Lord Buckmaster had this to say at p. 474:

> If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

[57] Writing a separate judgment, Lord Atkin had this to say in *Arcos, Limited v. E.A. Ronaasen And Son (supra)* (see p. 479):

A It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does 1/2 inch mean about ½ inch. If the seller wants a margin he must and in my experience does stipulate for it.

[58] Here, the plaintiff wanted the machine to be fitted with a VL140 drifter and it was supplied by the defendant. The plaintiff had accepted the goods and had used it for 22 months. That would amount to usage of the goods inconsistent with the ownership of the defendant as the seller. By way of an analogy, the case of *Barker, JR., & Co., Ltd. v. Edward T. Agius Ltd.* [1927] 28 Lloyd's Law Report 282 must be referred to. In that case, a cargo of coal briquettes was loaded partly on and partly under the deck of a ship. The master of the ship found that the cargo was leaking and thereafter bought the cargo on the deck from the buyers. Afterwards the buyers found out that the coal briquettes under the deck were not of the contract description and sought to reject the whole cargo. The court held that the buyers were not allowed to do so. In reselling a part of the goods, the buyers had exercised the right of ownership.

[59] Another striking analogy would be the case of *Hardy and Company v. Hillerns and Fowler* [1923] 2 KB 490, CA. In that case, a quantity of wheat arrived on c.i.f. terms. The buyers, without making proper inspection, resold various parcels to sub-buyers. Three days later the buyers found that the wheat was not of a contract quality and sought to reject it. It was held that they had lost the right of rejection.

[60] Here, the plaintiff did not reject the machine despite being given ample time and opportunity. The plaintiff failed to take advantage of the six months' warranty period. The defendant delivered the machine in July 1996 yet the plaintiff only raised the notice of alleged non-compliance of description and rejection of the machine after an inordinate delay of almost two years, and that was on 27 April 1998.

[61] To aggravate the matter further, we have evidence that the plaintiff had used the machine side by side with a brand new Ingersoll-Rand Crawler drill for a period of eight months at the PPH site without raising any complaint to the defendant. All these added a new complexion to the plaintiff's claim. The genuineness of the plaintiff's claims are questionable.

[62] I need to highlight the following salient facts. During the 22 months, the plaintiff had used the machine at two sites. The IJM site measured 20 acres while the acreage of the PPH site was 200 acres. These sites were accessible to third parties including the plaintiff's workers numbering between 30 to 50 people comprising of Indonesians and Bangladeshi's with three to four contractors managing the sites. The plaintiff had approximately eight lorry drivers who had access and who would enter and leave both the sites on an average of 30 times a day. In regard to the IJM site, PW1 (Heng Wooi Hin) had this to say (see p. 156 of the appeal record at vol. 2):

> I am not sure if there were security guards at these entrances.

[63] Only one security guard patrolled the PPH site. The plaintiff's workers at PPH site numbered 30 to 50 persons. PW1 (Heng Wooi Hin) confirmed that the other sub-contractor used about 50 workers. The machine was left at the site in darkness and it was possible that it would not be visible from the site office if the machine was left on the other side of the hill. There was ample evidence to suggest that the third parties would have access to the machine.

[64] Next, the plaintiff sought to apply the UK Unfair Contracts Terms Act 1977 ("UCTA") and for this purpose invoked s. 3(1)(a) of the Civil Law Act 1956 which enacts as follows:

> **3 Application of UK common law, rules of equity and certain statutes**
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956.

[65] It must be borne in mind that s. 3(1)(a) of the Civil Law Act 1956 has a cut-off date. That would be 7 April 1956. And that would be an impediment that is difficult to surmount.

[66] The provisions of UCTA cannot be imported into our local law bearing in mind that our existing contract law supplemented by local legislations and judge-made laws are sufficient to deal with any eventualities.

[67] Andrew Phang Boon Leong in *Law of Contract*, 1998 edn at p. 42 wrote as follows:

> Indeed, an even cursory glance at the Contracts Act reveals an intention to deal comprehensively with all the major contract law doctrines. This would result in, it is submitted, the non-reception of, for example, the Misrepresentation Act 1967, the Infants Relief Act 1874, the Minors' Contracts Act 1987, and (probably) the Unfair Contract Terms Act, ...

[68] And at p. 325, the learned author wrote:

> ... the Unfair Contract Terms Act 1977 ... is probably not part of the Law of Malaysia, ...

[69] Now, in regard to the defendant's counterclaim for the price of the machine, s. 55(1) of the Sale of Goods Act 1957 (Revised 1989) should be invoked. That section reads as follows:

> 55. Suit for price
>
> (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

[70] The plaintiff saw it fit not to make any payment in regard to the defendant's invoices. The invoices pertained to the price of the goods delivered and the services rendered. They form part and parcel of the defendant's counterclaim. The defendant was certainly entitled to get judgment for the counterclaim.

[71] Finally, the learned judge of the High Court peppered his written judgment with finding of facts. It is a judgment that does not require appellate intervention. Suffice for me to say that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. Lord

Sumner in *Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack, Owners of Steamship Hontestroom v. Owners of Steamship Durham* [1927] AC 37, HL, at pp 47 to 48 had this to say:

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r.1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment, the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* [1860] 14 Moo. PC 210, 235 Lord Kingsdown says:
>
> They, who require this Board, under such circumstances, to reverse a decision of the Court, below upon a point of this description, undertake a task of great and almost insuperable difficulty. ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

[72] The speech of Viscount Sankey LC in *Powell And Wife v. Streatham Manor Nursing Home* [1935] AC 243, at pp 249 to 250, HL, should be referred to. There he said:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. There are different meanings to be attached to the word 'rehearing.' For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the

A complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the Court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the B manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his C decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.* [1919 SC (HL) 35, 36, per Lord Shaw, where he says: 'When a judge hears and sees witnesses and makes a D conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that E he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of Justice. In Courts of Justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, F in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an Appellate Court in those circumstances is G for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who heard them was plainly wrong? If I cannot be satisfied in my own H mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[73] I say that a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, I weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The process

of evaluation of the evidence by the trial court must withstand scrutiny of the appellate court. Here, the impeccable written judgment of the learned judge of the High Court is beyond reproach. I take the position that this court, without having seen or heard the witnesses, is not in a position to come to any satisfactory conclusion on the printed evidence and, consequently, this court should not interfere (*Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 1 LNS 119, FC; *Muniandy & Ors. v. Public Prosecutor* [1966] 1 MLJ 257, FC; *Dr. Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153, FC; *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC; *Rex v. Low Toh Cheng* [1941] 10 MLJ (SSR) 1; *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176; *Choo Kok Beng v. Choo Kok Hoe & Ors.* [1984] 1 LNS 40; *Armagas Ltd. v. Mundogas S.A.* [1985] 3 WLR 640, CA; *State of Rajasthan v. Hanuman* AIR [2001] SC 282 at 284; and *Tek Chand v. Dile Ram* AIR [2001] SC 905).

[74] It is now appropriate for me to make those orders as made by learned brother Low Hop Bing, JCA. I do so accordingly.